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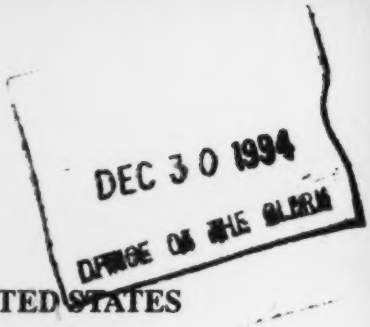
No. 94-883



In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITIONER'S REPLY MEMORANDUM

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December 29, 1994

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PETITIONER'S REPLY MEMORANDUM

The State Corporation Commission of the Commonwealth of Virginia (the "Commission") respectfully submits its Reply Memorandum in response to the Brief in Opposition to the Petition for a Writ of Certiorari (the "Opposition") filed with this Court by National Home Insurance Company ("NHIC").

Fundamentally, this case presents the question of whether the Products Liability Risk Retention Act, 15 U.S.C. §§ 3901-3906, (Pet. App. at 72a-88a) (the "Risk Retention Act") may be interpreted so as to impose upon the several states requirements for the establishment of their judiciaries not suggested by the federal statute. The Opposition confuses with this question the matter of how Virginia assigns subject-matter jurisdiction over risk retention groups among her state courts. In the case at bar, the first question had been resolved properly, and conclusively, by the United States District Court for the Eastern District of Virginia, Alexandria

Division (the "Federal Court"). Petitioner seeks this Court's review because the Virginia Supreme Court, rather than resolving the second question, one of State law, redecided the first, misinterpreting an unambiguous federal statute and thereby effectively reversing the Federal Court. The interpretation of that statute adopted by the Virginia Supreme Court would, additionally, render the statute violative of the Tenth Amendment.

The central thrust of the Opposition appears to be that the Commission has changed positions frequently and impermissibly. The record, however, is clear. The Commission has argued consistently that:

1. The Risk Retention Act is unambiguous and requires only that the orders it contemplates be entered by courts having personal and subject matter jurisdiction.

2. The unwarranted resort to legislative history so as to ascribe to the statute an unspoken requirement of institutional independence leads it to interfere in a manner violative of the Tenth Amendment with the establishment by the states of their judiciaries.

3. Once decided, properly, by the Federal Court, the question of what meaning should be read into the Risk Retention Act's use of the phrase "court of competent jurisdiction" had been resolved conclusively between the parties at bar and was not open to review by the Virginia Supreme Court.

4. It was the province of the Virginia Supreme Court to examine the question of whether Virginia had assigned subject-matter jurisdiction over risk retention groups to the Commission. The state court chose not to resolve that matter.

The Commission has never argued that the Virginia Supreme Court has violated the Tenth Amendment to the United States Constitution. Rather, the Commission has argued that certain provisions of the Risk Retention Act would violate the Tenth Amendment if they were given the interpretation espoused by NHIC and the Virginia Supreme Court.

As noted by the Commission in its Petition for a Writ of Certiorari (the "Petition"), it would be "unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4468 (1981). Until the Virginia Supreme Court rendered its decision, the Commission had anticipated that the Virginia Supreme Court would decide whether, under state law, the Commission (upon which the Virginia Constitution has bestowed the powers of a court) possessed subject matter jurisdiction over risk retention groups doing business in Virginia. However, when the Virginia Supreme Court disregarded the Federal Court decision and redecided the issue of whether the Commission was a court of competent jurisdiction under the Risk Retention Act, the unthinkable occurred. Since that time, the Commission has consistently and vigorously pointed out the fatal defects in the decision by a majority of the Virginia Supreme Court.[1]

In the Petition for Rehearing to the Virginia Supreme Court, the first opportunity that the Commission had after learning of that court's decision, the Commission argued that it was improper under this Court's well-settled jurisprudence for the Virginia Supreme Court to redecide the issue squarely joined and decided by the Federal Court.[2]

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1 NHIC's reliance upon *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1987), in support of the applicability of the "pressed or passed upon" rule is misplaced. The problem in *Bankers Life* was that the petitioner had made vague references to constitutional principles which did not preserve its constitutional arguments to this Court. Indeed, as this Court noted, "*Hathorn [v. Lovorn*, 457 U.S. 255 (1982)] would be apposite were we to conclude the appellant had adequately raised its claims on rehearing." *Bankers Life*, 486 U.S. at 77. A review of the Commission's Petition for Rehearing readily reveals that the claims now presented to this Court were specifically and more than adequately presented to the Virginia Supreme Court. *See, e.g.*, Pet. App. 59a-66a.

2 *See, e.g., Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Crescent City Live-Stock Landing and Slaughter-House Co. v. Butchers' Union Slaughter-House and Live-Stock Landing Co.*, 120 U.S. 141 (1887).

As pointed out herein, the Commission's position has never changed, and NHIC has not been prejudiced. NHIC has had ample opportunity to assert every procedural, jurisdictional and other argument and position it could devise. It has engaged in an astute and widespread resort to multiple forums, seeking abstention and participation from each at various points that it found optimal given its particular interests. NHIC should not now be heard to lament the results of that strategy. It has been neither surprised nor misled by any position taken by the Commission regarding this matter.

CONCLUSION

For the foregoing reasons, and those discussed more fully in the Petition, this Court should grant a Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

Respectfully submitted,

The State Corporation
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